(5)

No. 94-1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
v.
TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF FOR THE PETITIONER

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

May 10, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

53 pp

QUESTION PRESENTED

Whether a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), violates the Commerce Clause because it deprives "benevolent and charitable" non-profit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine."

LIST OF PARTIES

The Petitioner is Camps Newfound/Owatonna, Inc., a Maine Non-Profit Corporation. The Respondents are the Inhabitants of the Town of Harrison; Susan Searles, Michael Darcy, Paul Kilgore, Albert Haggerty and Robert Baker, as the Harrison Municipal Officers and Assessors; and Michael Thorne as the Harrison Town Collector.

STATEMENT PURSUANT TO RULE 29.1

Camps Newfound/Owatonna, Inc., a Maine Non-Profit Corporation, has neither parent nor subsidiary corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
STATEMENT PURSUANT TO RULE 29.1	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	10
I. FACIALLY DISCRIMINATORY STATUTES ARE "VIRTUALLY *PER SE* INVALID"	10
II. SECTION 652(1)(A)(1) FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE	15
A. The Law Court's Erroneous Choice of Standard of Review	17
B. The Statute's Adverse Impact on Interstate Commerce	19
C. Tax Exemption as a Means of Discrimination	23
III. SECTION 652(1)(A)(1) IS UNCONSTITUTIONAL WHEN TESTED UNDER THE *PER SE* RULE	24

TABLE OF CONTENTS—Continued

	Page
A. The Police Power Cases and the "Nondiscriminatory Alternative" Test	24
B. Section 652(1)(A)(1) and the "Nondiscriminatory Alternative" Test	28
1. The unconstitutionality of § 652(1)(A)(1) irrespective of available alternatives	28
2. The relevance of the "nondiscriminatory alternative" test to both facially discriminatory and facially neutral statutes	29
3. Available nondiscriminatory alternatives	30
IV. THE DORMANT COMMERCE CLAUSE SHOULD APPLY FULLY TO CHARITIES	32
A. The Nature of the Proposed Special Rule for Charities	32
B. The Legislative Intent—Presumed and Actual	35
C. The Significance of the Presumed Intent of § 652(1)(A)(1)	37
D. The Policy of the Dormant Commerce Clause	39
CONCLUSION	45

TABLE OF AUTHORITIES

CASES:	Page
Armco Inc. v. *Hardesty*, 467 U.S. 638 (1984)	14
Associated Indus. of Mo. v. *Lohman*, 114 S. Ct. 1815 (1994)	8, 15
Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984)	*passim*
Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)	25, 38, 42, 44
Boston Stock Exch. v. *State Tax Comm'n*, 429 U.S. 318 (1977)	*passim*
Brown-Forman Distillers Corp. v. *New York State Liquor Auth.*, 476 U.S. 573 (1986)	13, 14, 28, 29
C & A Carbone, Inc. v. *Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994)	*passim*
Chemical Waste Management, Inc. v. *Hunt*, 504 U.S. 334 (1992)	*passim*
Dean Milk Co. v. *Madison*, 340 U.S. 349 (1951)	8-9, 30
Edwards v. *California*, 314 U.S. 160 (1941)	*passim*
Fort Gratiot Sanitary Landfill, Inc. v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992)	*passim*
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928)	38
Fulton Corp. v. *Faulkner*, 116 S. Ct. 848 (1996)	*passim*
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)	11, 25
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976)	30
Greer v. *Connecticut*, 161 U.S. 519 (1896)	26
Guy v. *Baltimore*, 100 U.S. 434 (1880)	11, 14, 18
Hale v. *Bimco Trading, Inc.*, 306 U.S. 375 (1939)	38
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	6, 21
Henderson v. *Mayor of New York*, 92 U.S. 259 (1876)	25
Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937)	34
H.P. Hood & Sons v. *Du Mond*, 336 U.S. 525 (1949)	11
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)	31, 34
Hughes v. *Oklahoma*, 441 U.S. 322 (1979)	*passim*

TABLE OF AUTHORITIES—Continued

Page

Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) 14, 30, 35-36

I.M. Darnell & Son v. *Memphis*, 208 U.S. 113 (1908) .... *passim*

Kassel v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) 37

Lewis v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) 16, 21, 30, 36

Maine v. *Taylor*, 477 U.S. 131 (1986) 24, 27, 28, 35

Maine Milk Producers, Inc. v. *Commissioner*, 483 A.2d 1213 (Me. 1984) 4, 7, 19

Maryland v. *Louisiana*, 451 U.S. 725 (1981) .... *passim*

New Energy Co. v. *Limbach*, 486 U.S. 269 (1988) .. 7, 14, 23, 31

New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 13

NLRB v. *Yeshiva University*, 444 U.S. 672 (1980) .. 40

Oregon Waste Sys. v. *Department of Envtl. Quality*, 114 S. Ct. 1345 (1994) .... *passim*

Passenger Cases, 48 U.S. (7 How.) 283 (1849) 21

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) .. *passim*

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) .... *passim*

Reeves, Inc. v. *Stake*, 447 U.S. 429 (1980) 31, 34

South-Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 13

Sporhase v. *Nebraska*, 458 U.S. 941 (1982) 13, 26

Walling v. *Michigan*, 116 U.S. 446 (1886) 14

Westinghouse Electric Corp. v. *Tully*, 466 U.S. 388 (1984) 13, 14, 23, 28

West Lynn Creamery, Inc. v. *Healy*, 114 S. Ct. 2205 (1994) .... *passim*

White v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) 34

CONSTITUTION:

U.S. Const. art. I, § 8, cl. 3 2

U.S. Const. art. VI 2

TABLE OF AUTHORITIES—Continued

STATUTES: Page

28 U.S.C. § 1257 1

Me. Rev. Stat. Ann. tit. 36, § 652(1) (A) (1) .... *passim*

Mich. Stat. Ann. § 7.7 (4n) 44

MISCELLANEOUS:

Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988) 11

David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (1986) 11

Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097 (1988) 31-32

Alexander Hamilton, *The Federalist No. 22* (1787) 42

Frances R. Hill & Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* ¶ 1.01 (1994) 40

O.W. Holmes, *The Common Law* (1881) 42

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986) .. 32

Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986) 11, 42

Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981) 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court (Pet. 1a-8a) is reported at 655 A.2d 876. The opinion of the Superior Court for Cumberland County (Pet. 9a-19a) is unreported.

JURISDICTION

The Supreme Judicial Court entered its judgment on March 7, 1995. The petition for a writ of certiorari was filed on June 2, 1995 and was granted on March 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 652(1)(A)(1) of Title 36 of the Maine Revised Statutes, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)

(1), is reprinted at Pet. 20a-21a. The challenged portion of the statute provides that property tax exemptions otherwise available to "benevolent and charitable" institutions are to be denied to any such institution that "is in fact conducted or operated principally for the benefit of persons who are not residents of Maine."

Article I, Section 8, Clause 3 of the United States Constitution provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States," and Article VI provides that "This Constitution . . . shall be the supreme Law of the Land."

STATEMENT OF THE CASE

Petitioner challenges the constitutionality under the Commerce Clause of a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), that denies real estate tax exemptions to any otherwise qualified "benevolent and charitable" organization that "is in fact conducted or operated principally for the benefit of persons who are not residents of Maine." Petitioner is such an organization. Its challenge, while successful in the court of first instance, the Superior Court, was turned aside by the Maine Supreme Judicial Court (hereinafter referred to as the "Law Court" in accord with Maine practice).

Petitioner is a Maine-incorporated non-profit organization that has for many years operated a summer camp for Christian Science children in the Town of Harrison, respondent herein.[1] J.A. 38. Its purpose is to "help[] the children to grow spiritually, mentally and physically in accordance with the tenets of the Christian Science faith and thereby to become good citizens in society as

[1] The other respondents are the Town's assessors and its tax collector. Because of the unity of respondents' interests, we will refer to them collectively as "respondent." As we indicate below, the State is not a respondent.

adults." J.A. 40-41.[2] Accordingly, religious activities are a central component of the Camp's program. J.A. 41.

Petitioner, while the only Christian Science camp in New England, must recruit nationwide to secure adequate enrollment. During the tax years at issue, approximately 95% of petitioner's campers came from outside the state. J.A. 44.

Petitioner must also solicit contributions throughout the country in order to meet its operating expenses, which exceeded the income from its "modest endowment" and tuition revenue (about $400 a week per student) by about $175,000 a year during the three-year tax period in question. J.A. 41, 42, 51. Petitioner partly offset the cost of the tax—which averaged about $22,000 annually—by increasing tuition. That cost also to some extent diminished petitioner's ability to provide services. J.A. 42-43.

In these circumstances, and with other Maine camps benefiting from the exemption,[3] petitioner in 1992 requested of respondent a tax refund for the prior three years and a continuing exemption on the ground that § 652(1)(A)(1) was unconstitutional. J.A. 58-59. After respondent denied that request, petitioner brought suit. J.A. 36, 60.

The Superior Court granted summary judgment for petitioner, holding the statute incompatible with the "dormant" Commerce Clause. Viewing the provision as one "directly discriminat[ing] against interstate commerce," the court evaluated it under the "per se rule of

[2] The case was decided on summary judgment and there is no dispute as to material facts.

[3] The parties stipulated that "there were benevolent and charitable institutions" that principally served non-residents and therefore did not receive the exemption, and also that "there were [such] institutions" that did receive the exemption. J.A. 44-45.

invalidity" governing such statutes under this Court's rulings. Pet. 18a. In addition, the court: (1) found a sufficient impact on interstate commerce because of the character of the statute and the evidence of its effects (*id.* at 14a-17a & nn. 2 & 4); (2) held that it was immaterial whether the legislature's purpose was to aid resident campers rather than to harm non-resident campers (*id.* at 16a); and (3) ruled that, in any event, under the *per se* standard of review it was unnecessary to consider whether there were countervailing local interests (*id.*, at 18a).

The Town—but not the State, which had intervened as a defendant in the Superior Court (J.A. 2)—appealed, and the Law Court reversed.[4] Pet. 4a-7a. The pivotal element in its decision was its determination that the statute, because it treated all Maine charities alike, was "evenhanded" rather than discriminatory, and that therefore the more "flexible" standard of review established by this Court respecting such statutes, rather than the *per se* test, controlled. *Id.* at 6a. In addition, pursuant to its precedent,[5] the Law Court imposed a "heavy burden of persuasion" on petitioner. *Id.* at 7a.

In light of this standard and petitioner's burden, the court ruled that (1) no tax discrimination issue was presented because "[t]he exemption statute does not impose a tax" (*id.* at 4a); (2) the purpose of the exemption, to "promote the public benefits" provided by charities, is legitimate (*id.* at 6a); (3) petitioner does not compete with camps that receive the exemption because it "is unique, serving a very limited segment of the population," *i.e.*, persons "who choose to attend camps because of the religious affiliation" (*id.* at 6a-7a); (4) "there is

[4] One member, Justice Lipez, did not participate. He had decided the case in the Superior Court prior to his elevation to the Law Court.

[5] *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984).

no evidence that the exemption statute impedes interstate travel" (*id.* at 7a); and, finally, (5) the statute "bears no resemblance to the types of economic regulation that 'excite those jealousies and retaliatory measures the Constitution was designed to prevent' " (*id.* at 6a) (citation omitted).

Both the Superior Court and the Law Court rested their decisions upon this Court's decisions. The question is which court construed those decisions correctly.

SUMMARY OF ARGUMENT

The central question is whether Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) discriminates "on its face" against interstate commerce and accordingly is to be judged by the "virtually *per se* rule of invalidity" applicable to such statutes, *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), or whether instead it "regulates evenhandedly," as the Maine Law Court held, and therefore is to be tested under the more flexible approach of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The reasons assigned by the Law Court are not sustainable, and no other grounds can be advanced to support either its choice of standards or its holding.

1. A statute whose very terms unequivocally disclose discrimination against interstate commerce is almost certainly invalid. The governing principles, set forth in *Philadelphia* v. *New Jersey* and a series of subsequent decisions, were summarized as follows in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992): Laws that "facially discriminate[]," which "are generally forbidden," are "typically struck down without further inquiry." "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." And "the burden falls on the State." There must be "some reason, apart from their origin, to treat [the articles of commerce] differently." A "more flexible approach" involving "lesser scrutiny" is "only available

where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade." *Id.* at 342-44.

2. Section 652(1)(A)(1) should be measured under these principles, for it discriminates against interstate commerce on its face. It denies real-estate tax exemptions to any otherwise qualified "benevolent and charitable" organization "that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine." Thus, by the law's express terms, petitioner has been denied an exemption solely because too many of its campers come from other states. This is plainly discrimination, that is, "differential treatment," under dormant Commerce Clause doctrine. *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994).

And the provision burdens interstate commerce. The agreements between the petitioner and the non-resident campers are interstate transactions and their consummation requires interstate travel, which in turn constitutes interstate commerce. This Court so held in *Edwards* v. *California*, 314 U.S. 160 (1941), a decision invalidating a California statute making it a crime to transport an indigent into the state. That principle is confirmed also by *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 253-56 (1964), holding that Congress may, under the Commerce Clause, regulate public accommodations utilized in interstate travel because such travel is interstate commerce, considered together with such decisions as *Philadelphia* v. *New Jersey, supra*, affirming that the reach of the dormant Commerce Clause is coextensive with the power of Congress.

3. The grounds upon which the Law Court rested its opposite conclusion are contrary to this Court's decisions:

a. The Law Court held § 652(1)(A)(1) nondiscriminatory because it "does not favor in-state camps over

out-of-state competitors," but rather "treats all Maine charities alike." Pet. 5a-6a. Such a defense has been repeatedly rejected by this Court. Thus, in *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994), it was argued that there was no discrimination because the tax was imposed only on in-state dealers and applied to them equally. The Court responded that "[t]his argument, if accepted, would undermine almost every discriminatory tax case." "State taxes," the Court noted, "are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." 114 S. Ct. at 2216. See also, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 n.8 (1984); *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113, 117, 121 (1908).

b. The Law Court also thought a tax exemption, as opposed to a tax, not to be an instrumentality of discrimination. Pet. 4a. But this Court's decisions establish that an exemption is the Constitutional equivalent of a tax under the dormant Commerce Clause. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981) ("various tax credits and exclusions"); *Bacchus Imports*, 468 U.S. 263 (excise tax exemption); *I.M. Darnell*, 208 U.S. 113 (property tax exemption); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988) (sales tax credit).

4. The further grounds assigned by the Law Court for sustaining the statute are also not tenable:

a. While acknowledging that there was evidence that the cost of the tax was partly passed on by way of tuition increases, the Law Court found that "there is no evidence that the exemption statute impedes interstate travel." Pet. 7a. The Court reached this conclusion under a "flexible" standard of review coupled with imposition upon petitioner of a "heavy burden of persuasion" under a Maine precedent, *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984). Pet. 6a-7a. But where, as here, the statute plainly discriminates, no fur-

ther showing is required under this Court's decisions. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 855 n.3 (1996) ("[W]e have never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause."); *Maryland* v. *Louisiana*, 451 U.S. at 760 ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."); *Associated Indus. of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994) ("[A]ctual discrimination . . . is impermissible, and the magnitude and scope . . . have no bearing . . . .").

b. The Law Court's conclusion that, because of petitioner's Christian Science character, "nothing in the record suggests that [petitioner] *competes* with other summer camps" is irrelevant. Pet. 6a. *Edwards* v. *California*, *supra*, which did not involve competition, establishes that the question is simply whether there is discrimination against interstate commerce. Moreover, since other camps are open to Christian Science children, petitioner is in fact in competition. Finally, the statute is challenged on its face, and other organizations to which it applies are undeniably in competition.

c. Whether the statute's purpose was legitimate is immaterial (Pet. 6a), for it is well established in Commerce Clause cases that licit ends cannot redeem illicit means. *Philadelphia*, 437 U.S. at 626-27; *Chemical Waste Management*, 504 U.S. at 342-43. Many laws, accordingly, have been set aside as discriminatory despite unobjectionable goals.

5. Under either the *per se* or "more flexible" test, § 651(1)(A)(1) fails because there are nondiscriminatory alternatives that could have been employed to accomplish the purported objective of restricting the use of public monies to residents. Statutes unduly impacting interstate commerce, whether or not facially discriminatory, are not sustained in those circumstances. See, *e.g.*, *Philadelphia*, 437 U.S. at 626-27 (facially discriminatory); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 350 (1951) (facially neutral). Here, for example, vouchers could have been given to residents, or subsidies could have been provided to the establishments measured in some way by their service to residents. The requirement that reasonable alternatives be employed is especially apt where, as here, the legislative history casts doubt upon the asserted purpose and suggests that a desire to protect local enterprises and an animus against enterprises with non-resident roots played dominant roles.

6. Neither precedent nor policy supports the Law Court's evident belief that non-profit organizations and those they serve should not be accorded the protection that for-profit entities receive under the dormant Commerce Clause. Pet. 6a. The impact of a statute on interstate commerce is unaffected by whether the goal of the regulated organization is to make a profit or to serve the public. Indeed, *Edwards* v. *California* establishes that the Clause forbids discrimination against interstate transportation in the absence of any commercial element, much less a for-profit element.

7. The potential effects of a decision freeing states from the constraints of the dormant Commerce Clause argue strongly against such a holding. For example, the property of countless private colleges would be exposed to taxation. Moreover, the rationale of the decision would permit the withholding of state income tax deductions for contributions to non-profits not primarily serving residents. Except for the Maine statute, such restrictions are virtually without precedent. A fracturing of support for charities along state lines would be foreign to the nation's traditions and would predictably "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.*, 114 S. Ct. 1677, 1682 (1994).

ARGUMENT

The statute in question, § 652(1)(A)(1), when tested against the dormant Commerce Clause as construed by this Court, is invalid. It incontestably discriminates on its face against interstate commerce, for it deprives Maine "benevolent and charitable" institutions of tax exemptions if they are conducted "principally for the benefit of persons who are not residents of Maine." [6] The provision, accordingly, must be judged under the rule, firmly established by this Court's decisions and invoked just last February, that "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 854 (1996) (citation omitted). As we show, the reasons assigned by the Law Court for not applying the *per se* rule are contrary to this Court's decisions. Nor can any other exculpatory reasons be offered.

We begin with an examination of the evolution of the rules governing judicial review of statutes discriminatory on their face.

I. FACIALLY DISCRIMINATORY STATUTES ARE "VIRTUALLY *PER SE* INVALID."

While the rule that facially discriminatory state laws are "virtually *per se* invalid" has been framed in its present, uncompromising terms through a series of relatively recent decisions, it is rooted in the early, repeated, and consistent recognition by the Court that a principal role of the Constitutional provision designed to keep free the channels of interstate commerce must be to interdict laws of one state that discriminate against the commerce of another. As the Court has put it, "The prohibition against discriminatory treatment of interstate commerce follows

[6] The term "discrimination" in dormant Commerce Clause cases carries no overtones of invidiousness. It "simply means differential treatment." *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994).

inexorably from the basic purpose of the Clause." *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977). This prohibition, it seems safe to say, has for over 100 years been the irreducible core of this Court's dormant Commerce Clause jurisprudence.[7] Indeed, the Court itself has contrasted the constancy of its adherence to the nondiscrimination canon with the sometimes uncertain course of other aspects of its dormant Commerce Clause decisions.[8]

Over the past twenty-five years or so, that canon has been repeatedly considered by the Court, and the result has been both the reaffirmation of its central importance and significant explication respecting its proper application. It can fairly be said that the foundations of the modern analytical framework for adjudication of Com-

[7] That is, since at least *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1880), where the Court declared that the Constitutional bar to discriminatory taxes "must be regarded as settled." For the development of dormant Commerce Clause jurisprudence from Chief Justice Marshall's *dictum* in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), to *Guy*, see David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (1986), pp. 168-76, 222-36, 330-42, 403-16. Currie's view is typical: The "nondiscrimination principle has become a pillar of modern commerce-clause analysis." *Id.* at 405. See also, *e.g.*, Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 75 n.190 (1988).

[8] "This case-by-case approach has left 'much room for controversy and confusion . . . .' *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, . . . '[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned.' *Id.* at 458. Among these is the fundamental principle that . . . [n]o State . . . may 'impose a tax which discriminates against interstate commerce . . . .' *Ibid.*" *Boston Stock Exchange*, 429 U.S. at 329. See also *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2220 (1994) (Scalia, J. concurring); *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 551 n.2 (1949) ("State legislation which patently discriminates against interstate commerce has long been held to conflict with the commerce clause itself.") (Black, J., dissenting).

merce Clause discrimination cases were laid in two opinions in the 1970's, one involving a statute that was discriminatory on its face, the other a statute that was not. And it is the distinction between these two types of statutes that is now an anchor of the anti-discrimination doctrine.

The first of these cases was *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The Arizona statute in question required that all cantaloupes grown in the state be packed there. The law did not on its face discriminate against interstate commerce. That is, it applied to all fruit wherever sold and to all dealers wherever located. Nevertheless, the Court held that the provision impermissibly burdened interstate commerce, and in its opinion stated the "general rule" that has since been regularly invoked in judging legislation that, though neutral in terms, may unduly impact interstate commerce:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142 (citation omitted).

The second decision was *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), in which the Court held invalid a New Jersey statute prohibiting the importation of waste from other states—a facially discriminatory statute. In that decision, the Court for the first time, we believe, framed the standard governing review of such statutes in terms of "a virtually *per se* rule of invalidity," contrasting it with the "much more flexible approach . . . outlined in

Pike v. *Bruce Church, Inc.*," which applied where "there is no patent discrimination." 437 U.S. at 624.[9]

In a series of subsequent cases, the Court invoked, and elaborated upon, this *per se* rule. Thus, shortly after *Philadelphia*, the Court coupled that rule with a standard of "strictest scrutiny" respecting facially discriminatory statutes—there, a law prohibiting the commercial exportation of minnows to other states. *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). Then, in *Sporhase* v. *Nebraska*, 458 U.S. 941, 958 (1982), the Court cited *Hughes* in holding that an interstate reciprocity provision in a state statute did "not survive the 'strictest scrutiny' reserved for facially discriminatory legislation."[10]

Two 1984 decisions applied the same rule with the same result—invalidation of facially discriminatory laws: *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (the law "seems clearly to discriminate on its face against interstate commerce"); and *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406-07 (the statute was "on its face . . . designed to have discriminatory economic effects").[11]

---

[9] Chief Justice, then Justice, Rehnquist dissented in *Philadelphia*, as he has in the subsequent waste disposal cases discussed below, because of the health and safety issues raised there. We discuss later the relevance of the absence of police power issues in the case at bar. See *infra* pp. 28-29.

[10] Other features of the regulation were not facially discriminatory and were not invalidated. See discussion of *Sporhase* in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 363-66 (1992).

[11] There are several other 1980's decisions in which the Court held plainly discriminatory laws to be invalid, but we do not discuss them in the text because the Court did not expressly characterize the laws as discriminatory on their face. See *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 100 (1984); and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

In the 1990's, the Court has applied the *per se*/strictest scrutiny rule in half a dozen cases, one of which, *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), comprehensively cataloged the principal precedents. There the Court set aside a state law that imposed a fee on the disposal of hazardous waste generated outside, but not upon waste generated within, the state. Taxes that "facially discriminate[]" against interstate commerce, the Court declared, "are generally forbidden" and are "typically struck down without further inquiry." 504 U.S. at 342.[12] " 'At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.' " *Id.* at 342-43.[13] And "the burden falls on the State." *Id.* at 342.[14] There must be " 'some reason, apart from their origin, to treat [the articles of commerce] differently.' " *Id.* at 344.[15] While the Court has applied a "more flexible approach" involving "lesser scrutiny" in certain cases, that test is "only available 'where . . . there is *no* patent discrimination against interstate trade.' " *Id.* at 343 n.5.[16]

[12] Citing *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984); *Walling* v. *Michigan*, 116 U.S. 446, 455 (1886); *Guy* v. *Baltimore*, 100 U.S. 434 (1880); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406-07 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725, 759-60 (1981); and *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-37 (1977).

[13] Quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979).

[14] Citing *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, [504 U.S. 353, 363-66] (1992); and *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278-79 (1988).

[15] Quoting *Philadelphia* v. *New Jersey*, 437 U.S. at 626-27; citing also *New Energy Co.*, 486 U.S. at 279-80.

[16] Quoting *Philadelphia*, 437 U.S. at 624; citing also *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Chemical Waste Management had been preceded by a similar case in which the Court invalidated a county (rather than a state) ban on importation of waste as discriminatory on its face. *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). And it was followed by a decision turning aside Oregon's effort to stem waste importation by a fee rather than by an outright ban. *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345 (1994). The *Oregon Waste Systems* opinion, again summarizing the principal criteria, concluded that the "virtually *per se*" rule and the "strictest scrutiny" test together imposed a "burden of justification [that] is so heavy that 'facial discrimination by itself may be a fatal defect.' " 114 S. Ct. at 1351 (citation omitted). Finally, in somewhat more complicated circumstances that divided the Court as to the question whether the regulation was facially discriminatory, a waste processing ordinance was set aside on the basis of the *per se* test in *C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994).

This series of post-*Philadelphia* decisions closed with two cases in which the Court unanimously set aside state taxes and reaffirmed the guiding precepts respecting facially discriminatory statutes. As in *Fulton Corp.*, discussed *supra* at 10, the Court in *Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815, 1820 (1994), declared: "[W]e . . . have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade" (citation omitted).

We turn now to the question whether there is any basis for the Law Court's conclusion that the statute at issue does not facially discriminate .

II. SECTION 652(1)(A)(1) FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The Maine statute in issue facially discriminates against interstate commerce because in terms it denies a tax

exemption to Maine charities if they provide services in Maine to too many persons who reside in other states. A predictable result is that the interstate agreements that underlie, and the interstate travel connected with, such provision of services will be deterred. And that deterrence constitutes the violation. See, *e.g.*, *Boston Stock Exchange*, 429 U.S. at 334 n.13 (even if the tax does not itself cause traders to use out-of-state exchanges, it "is an inhibiting force," and "that inhibition is an unconstitutional barrier to the free flow of commerce").[17]

Most obviously, perhaps, the statute provides a strong incentive for charities to limit the number of out-of-state residents they serve so as not to lose the exemption. Alternatively, they may seek to offset the additional costs of serving non-residents by increasing their charges to them, thereby discouraging their patronage. If they take neither course, their added expenses will likely result either in an overall increase in their charges or in a

[17] Respondent has argued that the statute does not discriminate against interstate commerce because an exemption could be lost without interstate travel in the following hypothetical situation: "[A] Maine non-profit could operate from facilities in Maine, *e.g.*, a headquarters building, but deliver its charity primarily outside Maine." Br. Opp. 17. Surely a statute should not be tested by such a fanciful construct. Respondent argues, in effect, that the standard of review should be controlled by an application of the statute that is imagined and doubtless was not contemplated by the legislature, instead of by the application that is real and intended.

We perhaps should add that, were the hypothetical proposed by respondent actually presented, we would not agree that the absence of interstate travel matters. That is, in our view a law penalizing, solely because of residency, transactions between citizens of different states for the provision of services would, by virtue of that distinction alone, facially discriminate against interstate commerce. Neither interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation. See *Boston Stock Exchange, supra; Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

diminution in services or both. Whatever the precise form of the effects, the result will be that the charities serving too many non-residents, and those non-residents, will be disadvantaged in comparison to institutions serving primarily residents. The effects are of the same character as those that would be produced if the state were to impose a quota system or mandate higher non-resident charges. Put differently, the effects are precisely the same as those produced by a tax on transactions with non-residents, because that is in substance what the state has done.

In combination, these circumstances constitute a paradigmatic facial discrimination against interstate commerce. The Law Court erred in ruling otherwise, as we now demonstrate.

A. The Law Court's Erroneous Choice of Standard of Review.

As we have noted, § 652(1)(A)(1) escaped the "strictest scrutiny" under the "virtually *per se* invalid" rule because the Law Court concluded that it did not discriminate on its face. This view of the statute, so unlikely in terms of a common sense reading, was wrong as well in terms of the teaching of this Court's decisions.

The reason assigned by the Law Court for its view that § 652(1)(A)(1) does not discriminate against interstate commerce is that it "does not favor in-state camps over out-of-state competitors." Rather, "[t]he exemption statute treats all Maine charities alike. They all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally." Pet. 5a-6a.

This Court has expressly foreclosed this defense. It is typical for an unconstitutional tax to be levied against in-state, rather than out-of-state, subjects, since they are handy. Thus, in *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994), the Court rejected the very argument accepted here by the Law Court—that the tax did not discriminate against interstate commerce because it

was imposed only on in-state persons and applied to them equally. As the Court pointed out, "This argument, if accepted, would undermine almost every discriminatory tax case." "State taxes," the Court concluded, "are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." *Id.* at 2216.

The Court relied upon identical reasoning in *Bacchus Imports*. There the Court summarily dismissed the notion that there was no discrimination because the in-state taxpayers were all treated alike:

> "The State does not seriously defend the Hawaii Supreme Court's conclusion that because there was no discrimination between in-state and out-of-state *taxpayers* there was no Commerce Clause violation. Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers." 468 U.S. at 268 n.8.

The decision cited in *Bacchus* as a leading precedent, *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908), is especially instructive. Relying upon even earlier precedents, it underscores how long and firmly established is the rule that the Law Court disregarded here. Darnell operated a lumber mill and was taxed on logs it brought in from out-of-state, while timber cut within the state was exempt. The exemption applied to all property owners alike, and the state "asserted that, as the plaintiff company was a citizen of Tennessee, it could not be heard to complain." 208 U.S. at 117. The Court held the tax invalid as discriminatory, quoting *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1880), for the proposition that:

> " '[N]o State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, *or upon citizens because engaged in the sale therein, or the transportation thereto*, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.' " 208 U.S. at 121 (emphasis supplied).[18]

In short, this liminal choice between a strict and a more forgiving standard was wrongly made by the Law Court. And that choice was critical. Under the *per se* rule "[t]he State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.' "[19] But under the "flexible" standard employed by the Law Court, construed in light of its precedent,[20] a "heavy burden of persuasion" was imposed upon petitioner. A prime example of the consequences of this election of standards was the court's conclusion that the evidence did not establish that the statute burdened interstate commerce, a determination we address next.

B. The Statute's Adverse Impact on Interstate Commerce.

In considering the impact of § 652(1)(A)(1) on interstate commerce, the Superior Court properly focused upon the statute's relationship to interstate travel, since such travel is necessarily associated with the services provided to non-residents by the organizations covered by the law. Pet. 14a n.2. That is, those organizations furnish services at their Maine facilities, to which their non-resident patrons travel from their states. Thus, the nature of the interstate commerce involved is the same as that associated with the operation of a hotel, a college, or any other service organization with an interstate service area.

---

[18] For other cases in which the burden of the unconstitutional regulation fell "equally" upon all in-state entities, see, *e.g., Fort Gratiot Sanitary Landfill*, 504 U.S. at 361; *Oregon Waste Systems*, 114 S. Ct. at 1348; *C & A Carbone*, 114 S. Ct. at 1681.

[19] *Oregon Waste Systems*, 114 S. Ct. at 1351, quoting *Hughes*, 441 U.S. at 337.

[20] *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984).

A hotel could not, consistent with the dormant Commerce Clause, be penalized for "importing" non-resident guests on the theory that interstate commerce is not involved, any more than a lumber mill can be penalized for importing lumber, see *I.M. Darnell, supra.* So, too, it cannot be argued that the interstate travel necessarily associated with petitioner's service of non-residents is unprotected. For it is established that the dormant Commerce Clause protects interstate travel just as it does interstate transportation of lumber. The leading case is *Edwards* v. *California*, 314 U.S. 160 (1941), where the Court set aside as incompatible with the Commerce Clause a Depression-era California statute making it a misdemeanor for anyone to bring into the state an "indigent person who is not a resident." *Id.* at 171. The Court declared that "it is settled beyond question that the transportation of persons is 'commerce' within the meaning of that provision [the Commerce Clause]," [21] and also that "[i]t is immaterial whether or not the transportation is commercial in character." [22] *Id.* at 172.

Under *Edwards*, the travel associated with the provision of services by petitioner and the other charities covered by the statute is *a fortiori* interstate commerce, since it *is* commercial in character. That is, as in the case of hotels and like enterprises, there is an agreement, formal or informal, generally for consideration, with the non-resident to provide a camping program, or nursing home care, or boarding facilities.

[21] Citing: "*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 203; *Leisy* v. *Hardin*, 135 U.S. 100, 112; *Covington Bridge Co.* v. *Kentucky*, 154 U.S. 204, 218; *Hoke* v. *United States*, 227 U.S. 308, 320; *Caminetti* v. *United States*, 242 U.S. 470, 491; *United States* v. *Hill*, 248 U.S. 420, 423; *Mitchell* v. *United States*, 313 U.S. 80. Cf. The Federal Kidnaping Act of 1932, U.S.C., Title 18, §§ 408a-408c." *Edwards*, 314 U.S. at 172 n.1.

[22] Citing *Caminetti, supra* note 21 (noncommercial interstate transportation for immoral purposes).

Given this relationship between the charities providing the service and the non-residents served, the reliance by the Superior Court upon *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), was especially apt. Pet. 14a n.2. There, in sustaining federal civil rights accommodations legislation, the Court traced back to the *Passenger Cases*, 48 U.S. (7 How.) 283, 401 (1849), the principle that interstate commerce "include[s] the movement of persons through more States than one." 379 U.S. at 255-56. When that holding respecting the extent of Congress' power is coupled with the complementary well-established principle that the reach of the dormant Commerce Clause is coextensive with the reach of Congressional authority,[23] the correctness of the Superior Court's holding respecting the relationship of § 652(1)(A)(1) to interstate commerce is evident.[24]

The Law Court, however, disagreed, holding that there was insufficient proof that the statute did in fact impose a burden upon interstate commerce: "[A]lthough the record suggests that the denial of a tax exemption results in increased costs that are passed along 'to some extent' to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate

[23] "The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes*, 441 U.S. at 326 n.2, citing *Philadelphia*, 437 U.S. at 621-23 (rejecting a "two-tiered definition of commerce"). See also *BT Investment Managers*, 447 U.S. at 39; *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 n.3.

[24] The consequence of this unitary concept of interstate commerce under both aspects of the Commerce Clause is not, of course, that a state law affecting interstate travel in any way is invalid, as respondent has suggested in urging that the Superior Court erred in relying upon *Heart of Atlanta Motel*. Br. Opp. 11-12. Otherwise states would be barred from countless other actions affecting countless aspects of interstate commerce even where Congress is silent. It is only state legislation that improperly bears upon interstate commerce that is foreclosed.

travel." Pet. 7a. And, as we have noted, the court demanded a good deal in that respect because of its cardinal ruling respecting the appropriate standard of review—"flexible"—and the placement of the burden of proof—on petitioner—and the degree of that burden—"heavy."

But nothing remotely approaching such a demonstration is called for by this Court's decisions. Rather, it is enough to show that the tax is real and that it discriminates against interstate commerce, as the Superior Court held. Noting that the "inescapabl[e]" consequence of the statute is "to make the cost of providing services to out-of-state residents more expensive," the court concluded that under this Court's rulings that was enough:

> "In *Maryland* v. *Louisiana*, the Court refused to allow for more evidence concerning the extent of the discrimination: 'We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' 451 U.S. at 760. It follows from this assertion that the fact of discrimination against interstate commerce, rather than its extent, is the primary consideration. . . ." Pet. 17a.

This issue was addressed most recently in *Fulton Corp.*:

> "Although the Secretary does suggest that the tax is so small in amount as to have no practical impact at all, we have never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause. See, *e.g.*, *Associated Industries of Mo.* v. *Lohman*, —— U.S. ——, ——, 114 S. Ct. 1815, 1822, 128 L. Ed. 2d 639 (1994) ('[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred[.]'); *Maryland* v. *Louisiana*, 451 U.S. 725, 760, 101 S. Ct. 2114, 2135, 68 L. Ed. 2d 576 (1981)." 116 S. Ct. at 855 n.3.[25]

[25] See also *Pike*, 397 U.S. at 145 ("The nature of that burden is, constitutionally, more significant than its extent."); *Boston Stock Exchange*, 429 U.S. at 334 n.13.

In the case at bar, "actual discrimination" is evident from the face of the statute, its enforcement, and the likely consequences that we have outlined above.

C. Tax Exemption as a Means of Discrimination.

The Law Court appeared to regard the form of § 652 (1)(A)(1) as a saving feature. Thus:

> "Tax exemptions are characterized in Maine's tax statutes as 'tax expenditures' . . . . The exemption statute does not impose a tax; it exempts nonprofit corporations that choose to meet certain standards from a tax that all other taxpayers must pay." Pet. 4a.

But it is well established that denial of a tax exemption is not only the functional, but also the Constitutional, equivalent of imposition of a tax for purposes of the dormant Commerce Clause. This principle was established as long ago as 1908 in *I.M. Darnell*, 208 U.S. at 125, which involved a property tax exemption. That rule has been followed with regularity. See *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981) ("[T]he Louisiana First-Use Tax unquestionably discriminates against interstate commerce . . . as the necessary result of various tax credits and exclusions."); *Bacchus Imports*, 468 U.S. 263 (excise tax exemptions); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988) (sales tax credit); *Westinghouse*, 466 U.S. at 399-400 & n.9.[26]

There is one final defense raised by respondent, though not by the Law Court, based on the form of the provision: That it is distinguishable from a tax because it is not only an exemption, but an exemption from a *property*

[26] In *West Lynn Creamery*, Justice Scalia, in concurring, noted that exemptions and credits are "no different in principle" from tax laws that "facially discriminate" and have "likewise been held invalid." 114 S. Ct. at 2220.

tax.[27] But surely it cannot matter whether the vehicle for imposing the burden is a property tax or some other sort of tax, any more than it matters whether it is a credit or an exemption. The impact on interstate commerce is the same no matter the form. At any rate, and not surprisingly, the argument is foreclosed by precedent. As we have already noted the statute struck down in *I.M. Darnell*, 208 U.S. at 115, was a property tax exemption.

III. SECTION 652(1)(A)(1) IS UNCONSTITUTIONAL WHEN TESTED UNDER THE *PER SE* RULE.

To be sure, to say that a statute should be subjected to "the strictest scrutiny" because it is of a type that is "virtually *per se*" unconstitutional and that is "typically struck down without further inquiry," while signaling an almost certain outcome, does not absolutely foreclose a different one. And, indeed, this Court has upheld a facially discriminatory statute in one—but only one—recent case, *Maine* v. *Taylor*, 477 U.S. 131 (1986). We now examine *Taylor* and related cases in terms of what issues may be left for consideration once it is determined that a law is discriminatory on its face. As we show, under this precedent there is no warrant for exempting § 652(1)(A)(1) from the rule of invalidity.

A. The Police Power Cases and the "Nondiscriminatory Alternative" Test.

Perhaps the principal source of tension under the dormant Commerce Clause between local and federal inter-

[27] Respondent asserted that "[m]unicipal property tax exemptions are also different from excise and sales tax exemptions" because "the non-exempt property taxpayers must 'make up for' the dollars lost as a result of the exemption," whereas "if a product is exempted from an excise tax or a sales tax . . . there is no automatic shifting of taxes to other products and their consumers." Br. Opp. 9-10. If this is a distinction, it makes no difference. Automatic or not, if one person is exempt someone else pays.

ests has been attempts by the states to exercise their police power in ways that have arguably discriminated against interstate commerce. The Court has always acknowledged the legitimacy of the states' interest in securing the health and safety of their citizens, as well as in conserving their natural resources, and early decisions upheld what would now be termed facially discriminatory laws barring the importation of articles such as "unhealthy swine or cattle . . . or decayed or noxious foods" on the theory that the offending materials were simply not articles of commerce within the meaning of the Commerce Clause.[28]

But here again *Philadelphia* v. *New Jersey* marked an important doctrinal shift. There the Court held that "all objects of interstate trade merit Commerce Clause protection," and explained the quarantine decisions on the ground that the articles "required destruction as soon as possible because their very movement risked contagion and other evils." 437 U.S. at 622, 628-29.[29] See also, *e.g.*, *Chemical Waste Management*, 504 U.S. at 346-48. Applying, then, the *per se* test to the facially discriminatory waste importation ban at issue, the Court in *Philadelphia* concluded that it should be set aside because of that discrimination coupled with the consideration that the environmental hazards associated with waste could be alleviated by a nondiscriminatory alternative, one that would bear equally upon waste generated both inside

[28] See *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935) and cases there cited. This rationale took form as early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) at 203.

[29] This approach had historical credentials. It had been foreshadowed fifty years after *Gibbons* by *Henderson* v. *Mayor of New York*, 92 U.S. 259, 271-72 (1876) ("Nothing is gained in the argument by calling it the police power. . . . [W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void. . . .").

and outside the state.[30] Accordingly, the importation ban fell.

It is this doctrine respecting the availability of nondiscriminatory alternatives to facially discriminatory statutes that has been of controlling importance in the post-*Philadelphia* waste disposal cases discussed above and that is, as we will show, of special relevance here. Thus, in *Fort Gratiot Sanitary Landfill*, 504 U.S. at 366, the Court held that the state had not met "the burden of proving that [the regulations] further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives." And in *Chemical Waste Management*, 504 U.S. at 344-45, the Court stressed that "[l]ess discriminatory alternatives . . . are available to alleviate this concern. . . ." A like consideration was the basis for the final decision in this series, *C & A Carbone*, 114 S. Ct. at 1638: The town "has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question."

This same adjudicatory principle has been followed in cases involving another state interest the Court has recognized as substantial, the conservation of natural resources. Here, too, facially discriminatory statutes have been held invalid where nondiscriminatory alternatives were available. See *Hughes*, 441 U.S. at 338 ("[N]ondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose [of fish conservation] more effectively."); [31] *Sporhase*, 458 U.S. at 957-58 (the

[30] "And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626.

[31] *Hughes* overruled a decision based on a rationale analogous to the quarantine cases, *Greer* v. *Connecticut*, 161 U.S. 519 (1896) (wild game not articles of commerce).

water regulation "is not narrowly tailored to serve" the asserted conservation purpose).

Since health, safety, and conservation needs can almost always be addressed by facially neutral measures, it is not surprising that, under modern dormant Commerce Clause jurisprudence,[32] there has been but one facially discriminatory enactment that has been upheld so far as we are aware—the law sustained in *Maine* v. *Taylor*.

In *Taylor*, the statute in question explicitly barred the importation of live baitfish from out-of-state and therefore was "subject to the strict requirements of *Hughes* v. *Oklahoma*." 477 U.S. at 138. But the law was sustained on the basis of a trial court finding that no other method would adequately protect against infestation of the native fish population. Thus, the statute "satisfie[d] the requirements ordinarily applied . . . to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means." *Id.* at 140. As the Court later explained *Taylor*:

> "Maine there demonstrated that the out-of-state baitfish were subject to parasites foreign to in-state baitfish. This difference posed a threat to the State's natural resources, and absent a less discriminatory means of protecting the environment—and none was available—the importation of baitfish could properly be banned." *Chemical Waste Management*, 504 U.S. at 348.

This single ratification of a facially discriminatory statute, both in its uniqueness and its rationale, undermines rather than supports the decision below, as we now show.

[32] That is, putting aside the pre-*Philadelphia* cases discussed above. This is not to say that the outcome might not be the same in some of those cases; but under *Philadelphia* and its progeny the statutes would have to meet the "no available alternative" test.

B. Section 652(1)(A)(1) and the "Nondiscriminatory Alternative" Test.

In light of these precedents, if the invalidity of § 652 (1)(A)(1) is not established by its unambiguous discrimination alone, the question of the availability of nondiscriminatory alternatives would have to be considered. Before we do so, however, we describe why this statute is infirm whether or not alternatives were at hand.

1. *The unconstitutionality of § 652(1)(A)(1) irrespective of available alternatives.* While *Taylor* establishes that a facially discriminatory statute *may* be valid if the state had no reasonably available alternatives for dealing with a significant problem, it does not stand for the proposition that a statute is *always* valid in such circumstances. The Court stated no such rule in *Taylor*, and there are contrary indications in other decisions. Thus, the Court has said that "facial discrimination *by itself may be a fatal defect*," [33] and that such discrimination *"at a minimum* . . . invokes the strictest scrutiny . . . of the absence of nondiscriminatory alternatives." [34] And in contrast to *Taylor* stand several decisions discussed in the opening part of this brief in which plainly discriminatory laws were held invalid without consideration of the question of alternatives.[35]

Given these decisions, together with the Court's near categorical phrasing of the standard and the almost unbroken line of decisions striking down facially discriminatory statutes, it would seem, at a minimum, that the non-

[33] *Hughes*, 441 U.S. at 337 (emphasis supplied), quoted in *Oregon Waste Systems*, 114 S. Ct. at 1351.

[34] *Chemical Waste Management*, 504 U.S. at 342-43 (emphasis supplied) (quoting *Hughes*, 441 U.S. at 337).

[35] *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406-07 (1984); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); and *Brown-Forman Distillers* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

availability of alternatives would not always save such a statute. Presumably the result should turn in part upon the importance of the state's interest. The state's interest in foreclosing non-residents from benefiting from charitable tax exemptions scarcely stands on the same footing as the interest of the state in protecting its fisheries from contamination or in any of the other police power or natural resource measures discussed in the cases we have listed.[36] In these circumstances, the plain and purposeful discrimination reflected in § 652(1)(A)(1) should condemn the statute without more.

However, the Court need not reach the question whether § 652(1)(A)(1) would be valid in the absence of legislative alternatives, for such alternatives did, and do now, exist. Before describing some of those options, we note the relevance of this question under both the *per se* and the "flexible" standards of review.

2. *The relevance of the "nondiscriminatory alternative" test to both facially discriminatory and facially neutral statutes.* While the Superior Court found that there were nondiscriminatory alternatives to § 652(1)(A)(1) (Pet. 19a), the Law Court did not even mention the issue, even though this Court's decisions have made clear that the question of alternatives is an integral component of the "flexible" standard as well as of the *per se* rule.[37] Thus, as we have noted, under *Pike* an important question is whether the "legitimate local purpose . . . could be

[36] As in *Pike*, 397 U.S. at 143, "We are not, then, dealing here with 'state legislation in the field of safety' . . . or with an Act designed to protect consumers . . . from contaminated or unfit goods." (footnote omitted).

[37] Nor has respondent at any point argued that no nondiscriminatory alternatives were available. Curiously, the Law Court cited only decisions involving facially discriminatory statutes, not any involving facially neutral statutes: *Brown-Forman Distillers*, *Associated Industries of Missouri*, *C & A Carbone*, *Chemical Waste Management*, and *Oregon Waste Systems*.

promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.[38]

Therefore, our discusion below as to the availability of alternatives pertains even were the *Pike* standard of review appropriate. We note, moreover, that under that standard neither this issue nor any other should have been examined pursuant to the "heavy burden of persuasion" invoked by the Law Court. That rule finds no support in any decision of this Court. On the contrary, where there is good reason to find a discriminatory burden on interstate commerce, even as to a facially neutral statute "the burden falls on the State to justify it both in terms of the local benefits . . . and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977), and cases cited.

3. *Available nondiscriminatory alternatives.* Withholding exemptions from charities that serve too many nonresidents was by no means the only way that the state could have secured its purported interest in directing public financial support to the benefit of residents alone. "Reasonable and adequate alternatives" were, and are, available.[39] The tax exemptions, for example, could be replaced with vouchers to residents for use at licensed

[38] *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), is another leading precedent. There the Court overturned a city ordinance that, though evenhanded in terms, as a practical matter erected a barrier to the interstate importation of milk. This, the Court held, the city "cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. . . ." *Id.* at 354. See also *BT Investment Managers*, 447 U.S. at 43; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 376-78 (1976).

[39] We take the "reasonable and adequate alternatives" phrase from *Dean Milk Co.*, 340 U.S. at 354.

camps, nursing homes, or other covered establishments. Or payments could be made directly to the institutions to defray residents' fees. There could be no constitutional objection to such measures, any more than to granting scholarships to residents. Interstate commerce would not be affected, since charities would not be penalized for serving non-residents. And these alternatives would be more than "adequate," since financial support would be limited to residents, whereas under § 652 (1)(A)(1) benefits also flow to non-residents who are served by charities that are devoted primarily to residents.

To be sure, costs would be increased for those organizations now receiving an exemption; but, to the extent they serve residents, so would the effective economic demand for their services and, correspondingly, their ability to increase charges. There is surely no indication that these organizations would founder under such a regime. Moreover, it is likely that an additional alternative—the provision of subsidies to charitable institutions related in some way to their service to residents—would also be constitutionally permissible.[40] Such a measure

[40] While the Court has not spoken unequivocally to the question of subsidies under the dormant Commerce Clause, see *West Lynn Creamery*, 114 S. Ct. at 2214 n.15, it appears likely that such measures would, generally at least, be approved. See *New Energy Co.*, 486 U.S. at 278 ("Direct subsidization of domestic industry does not ordinarily run afoul" of the dormant Commerce Clause.); *West Lynn Creamery*, 114 U.S. at 2220 (Justice Scalia, concurring) ("[A]pplication of a state subsidy from general revenues is . . . far removed from what we have hitherto held to be unconstitutional . . . . Indeed, in my view [we] have already approved the use of such subsidies. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 809-810 . . . (1976)."); *Alexandria Scrap*, 426 U.S. at 815 (Justice Stevens, concurring); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 447 n.1 (1980) (Justice Powell, dissenting). For discussions of the reasons for distinguishing subsidies from taxes under the dormant Commerce Clause, including the consideration that since subsidies require conscious deliberation they are likely to be carefully considered and not to proliferate, see Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097,

would certainly have a "lesser impact on interstate activities" than Section 652(1)(A)(1),[41] since an organization would not lose all fiscal support unless it served "primarily" residents, but rather would benefit from the provision of services to whatever complement of residents it did serve.

IV. THE DORMANT COMMERCE CLAUSE SHOULD APPLY FULLY TO CHARITIES.

For the reasons we have given, a statute like § 652(1)(A)(1) directed at ordinary commercial enterprises would unquestionably be invalid. There would be no defense, for example, for a law that, in order to discourage an overflow of tourists without penalizing residents, exempted from an accommodations tax those hotels serving principally residents. The Law Court's opinion, however, as well as respondent's arguments (Br. Opp. 8-9), reflect the conviction that differential taxation of charities should be judged by special, and especially liberal, criteria. But, for reasons we outline below, there is no warrant in precedent or policy for a ruling that would open non-profit organizations to discrimination from which for-profit businesses would be immune. It is the character of the interstate commerce involved and the impact upon it that is the key, not the nature of one or another participant in the chain of transactions.

A. The Nature of the Proposed Special Rule for Charities.

It is plain enough that the Law Court thought the charitable status of those subject to the statute was sig-

1134-35 (1988); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 544 (1981); and Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1194-95 (1986).

[41] *Pike*, 397 U.S. at 142.

nificant, though it is not so plain why or how. The most pertinent passage in its opinion is this:

> "The purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. This is a legitimate state interest." Pet. 6a.

This unquestionably correct generalization, however, does not relate to the issue, which is the legitimacy, not of the tax exemption, but of the state's decision to make it unavailable to charities that serve too many non-residents. Nevertheless, respondent thinks that in this passage the Law Court "explicitly recognized" the "key importance" of the difference between "[t]he purpose and effect of tax exemptions for non-profit *vis-a-vis* for-profit organizations" (Br. Opp. 9). We concur in this reading of the court's opinion, partly because of the transparent infirmity of the other grounds the court assigned. One is entitled to wonder, for example, whether the court would have sanctioned a statute exempting from property taxes Maine mills if, but only if, they produced lumber primarily from trees grown in Maine, on the grounds that all Maine mills were treated alike, or that a tax exemption was not the Constitutional equivalent of a tax. See *I.M. Darnell, supra.*

The further question is precisely what the result of this purported special status of charities might be. In this case, the result was the application of the rule pertaining to facially neutral statutes. But the statute is in fact facially discriminatory. It seems clear enough, then, that under the Law Court's approach the *per se* test will never be applicable in cases involving charities no matter how palpably discriminatory the statute may be.

Nor for that matter, as we see it, does that approach permit the overturning of such a statute even under the *Pike* test. If the issue is to be resolved by a balancing of interests, and if the state's interest in adjusting its

taxing system so as to provide favored treatment to charities serving residents prevails in this case, it will always prevail. The opposing interest is simply the obverse. And the tax discrimination will always be admirably suited to the purpose. Thus, as a practical matter the proposed rule would likely simply strip charities and those they serve from the protection of the Commerce Clause against economic discrimination.

But it is not necessary to know whether the consequence of the doctrine would be complete, or merely virtual, immunity from the dormant Commerce Clause to consider whether there is warrant for any differential treatment at all. We now examine that question, but first note preliminarily that the exemptions this Court has recognized surely provide no support for such an innovation. One, the "market participation" exemption, under which a state acting as a market participant rather than a governmental regulator is not subject to the Constitutional provision, is simply irrelevant.[42] The second, the compensatory tax exemption, under which a facially discriminatory tax on interstate commerce is valid if it simply balances a comparable tax on intrastate commerce,[43] argues against sanctioning discrimination against charities, for it is grounded in the principle of equality, not inequality.[44]

[42] See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

[43] "[A] facially discriminatory tax may survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 116 S. Ct. at 851 (citation omitted). See also, *e.g.*, Justice Cardozo's classic explanation in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 584 (1937) ("When the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. . . . [T]he sum is the same when the reckoning is closed.").

[44] We refer to the compensatory tax doctrine as involving an "exemption" because, once the tax is found to be compensatory, the Commerce Clause is inapplicable, just as it is in the market participation cases once it is determined that the state occupies that role. Alternatively, we could have included compensatory tax decisions with *Maine* v. *Taylor* as situations where there was no available alternative to achieve a legitimate result. See, *e.g.*, *Oregon Waste Systems*, 114 S. Ct. at 1352 ("[T]he concept of the compensatory tax . . . is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.") We place the cases here because the justification advanced for § 652 (1)(A)(1) has nothing at all to do with the compensatory tax doctrine but does bear some relation to the police power cases. That is, the inequality of the tax burden is admitted, but defended in terms of a supervening local interest. At any rate, our point respecting the compensatory tax cases is the same however they are classified: they stand for the principle of equality, the pre-eminence of which is confirmed by the strictness with which the Court has applied this doctrine. As the Court noted in *Fulton*, 116 S. Ct. at 859 & n.8, except for one 1869 decision, the Court has refused to sanction as "compensatory" any tax other than one that is part of a sales/use tax combination.

B. The Legislative Intent—Presumed and Actual.

There is a very practical reason for not exempting this provision from examination under the ordinary Commerce Clause canons—doubt respecting the purpose of the legislature. One important function of the "available alternatives" test is to put the state to its proof as to the asserted statutory purpose. If the law appears to be related to a health or safety issue but also adversely impacts interstate commerce, and if the legislature has declined to employ a reasonable non-discriminatory alternative, it is fair to conclude that its real purpose may have been different than the purpose proclaimed. This seems clearly to have been an aspect of the Court's reliance upon the available alternative test.[45]

[45] Thus, in *Hunt* the Court observed that "[d]espite the statute's facial neutrality," there are "some indications in the record" that "its discriminatory impact on interstate commerce was not an unintended byproduct." But, the Court said, it "need not ascribe an economic protection motive" to the state legislature. It was enough

In our argument, we assume that the purpose of the legislature was precisely that which is reflected by the terms of the statute, namely, to provide public support through the taxing mechanism for those, and only those, charitable institutions that serve primarily state residents. But our assumption may well be contrary to fact. There was *no* discussion during the legislative debate about the desirability of limiting tax support to the provision of charitable services to residents. Rather, there was a good deal of discussion about the desirability of raising money and of preventing fraud by ostensibly charitable organizations—as to which, of course, much more suitable alternatives were at hand—as well as indications of considerably less benign purposes—both animus toward nonresidents and the one legislative purpose, economic protectionism, that has repeatedly been identified by this Court as a badge of Constitutional infirmity.[46] See, *e.g.*, *Bacchus Imports,* 468 U.S. at 270; *Philadelphia* v. *New Jersey,* 437 U.S. at 624.

In these circumstances, it is reasonable to wonder about the real motivation for this statute. And that question is

that "nondiscriminatory alternatives . . . are readily available." 432 U.S. at 352-54. See also *BT Investment Managers,* 447 U.S. at 43.

[46] The legislative history of the bill is reproduced at Pet. 22a-28a. One supporter of the bill said he would "want . . . the members of the House" "to know" that the bill "has been approved in essence by a great many of the camps that are operating," presumably those who would not lose their exemptions. Pet. 23a. The other arguments for the bill were based on (1) the need to raise money; (2) the desire to raise it from "institutions that are set up within the State of Maine by out-of-state people for out-of-state people"—the "main goal"; (3) a belief that the existing law was being abused by "persons outside the State of Maine who come here, where it is a simple matter to incorporate, set up a summer camp and they call themselves a charitable institution"; and (4) the corresponding belief that the bill will not "affect any business that is in the State run by anybody that is in this State." Pet. 23a-28a.

legitimate, since this Court has held that the "stricter rule of invalidity" may be invoked upon the results of "[e]xamination of the State's purpose." *Bacchus Imports,* 468 U.S. at 270, 271 (holding the "more flexible approach" not applicable partly because of the "legislature's motivation"). However, there has been debate about this issue;[47] and the evidence here is undeniably not as strong as it was in *Bacchus.* Accordingly, we point to the legislative history, not as a basis for positing a purpose other than that indicated by the statutory language, but rather as a reason for applying the *per se* rule with its component requirement that reasonably adequate nondiscriminatory alternatives be unavailable.

C. The Significance of the Presumed Intent of § 652(1)(A)(1).

If the purpose of the statutory restriction be assumed to be to insure that public expenditures in support of charities will benefit residents rather than non-residents, it seems clear from this Court's decisions that, if the purpose is of a type that does not condemn the statute, neither does it save it. The aim is not grounded in economic protectionism. But, as we have suggested, neither does it match the police power as a fundamental constituent of state political authority. Rather, it would appear to stand on about the same plane as many other legitimate purposes of statutes that have, nonetheless, been held violative of the dormant Commerce Clause.

The Court addressed this issue of the role of legislative intent in dormant Commerce Clause cases in *Philadelphia* v. *New Jersey.* There, in a frequently quoted passage, the Court emphasized that a legitimate goal will not redeem a Constitutionally impermissible means.

[47] See, *e.g.*, *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 677 (majority opinion), 680-83 (Brennan, J., concurring), 702-04 (Rehnquist, J., dissenting) (1981).

"This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant . . . . [T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. . . ." 437 U.S. at 626.

Since the law was discriminatory "[b]oth on its face and in its plain effect," it was invalid because it constituted an illicit means, even if in the service of a licit end, just as had been true in prior cases involving legislation aimed at "assur[ing] a steady supply of milk," [48] "creat[ing] jobs by keeping industry within the State," [49] or "preserv[ing] the State's financial resources from depletion by fencing out indigent immigrants." [50] 437 U.S. at 627. Or, the Court added in *Chemical Waste Management*, "to encourage the use of ethanol and thereby reduce harmful exhaust emissions," [51] or "to support inspection of foreign cement to insure structural integrity." [52] 504 U.S. at 341.

[48] Citing *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 522-524.

[49] Citing *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10.

[50] Citing *Edwards* v. *California*, 314 U.S. 160, 173-174.

[51] Citing *New Energy Co.* v. *Limbach*, 486 U.S. 269, 279 (1988).

[52] Citing *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375, 379-380 (1939). Nor does it matter whether, as the Law Court believed, it was "not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine." Pet. 6a. As this Court noted in *Bacchus Imports*, rejecting a defense that the law was "not enacted to discriminate against foreign products, but rather, to promote a local industry":

> "If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other. . . ." 468 U.S. at 273 (citation omitted).

The assumed purpose, then, if unobjectionable, is not exculpatory either.

D. The Policy of the Dormant Commerce Clause.

The respondent has argued that § 652(1)(A)(1) falls outside the range of the dormant Commerce Clause because that Constitutional provision applies only to statutes designed to give "for-profit organizations . . . a competitive advantage over . . . out-of-state producers." Br. Opp. 9. The Law Court, in referring to the statute as "bear[ing] no resemblance to the types of economic regulation" falling within the purposes of the Commerce Clause (Pet. 6a), seems to have held the same view. Such a restrictive reading collides with precedent and the purposes of the Clause.

It is true that dormant Commerce Clause litigation has generally involved private for-profit enterprises. But the Commerce Clause speaks simply of interstate commerce, not for-profit interstate commerce. And in *Edwards* v. *California* the Court explicitly confirmed that the dormant Commerce Clause reaches interstate commerce, there in the form of private transportation, whether or not commercial.

Moreover, while in *Edwards* there was no touch of commercial relations, that certainly is not true of the case at bar, as we have already noted (*supra*, pp. 19-21). To begin with, non-profit organizations in this country are collectively, and in many cases individually, "big business" in every sense except that they have purposes other than making a profit. We leave to *amici curiae* a self-description, but all know that in terms of every indicia—number of employees, wages and benefits, purchase of goods and services—non-profits are major players in the American economy.[53] Accordingly, their activities

[53] "In 1990, exempt organizations' total assets exceeded $1 trillion, their total gross receipts reached $807 billion, and their gross revenues totaled approximately $560 billion, or 10.5 percent

are, of course, subject to regulation by Congress under the Commerce Clause.[54] If those activities were not reached by the dormant Commerce Clause, the congruity between the affirmative and negative aspects of that provision that this Court has marked would be disrupted. See *supra* p. 21.

As to the particular activities here in question—the provision of services to campers, residents of nursing homes and boarding facilities, patients at mental health service facilities and the like—commercial relationships are central. The patrons, who are the persons likely to be ultimately affected by the tax, enter into contracts with the service providers, and from the patrons' viewpoint it makes no difference whether those providers are non-profit or for-profit. The situation is no different where the provider is a for-profit enterprise (as, of course, many organizations like camps and nursing homes are). It is the ultimate "non-profit" consumer who is likely to pay for the discriminatory tax through higher prices. If it is a discriminatory hotel tax, it is the non-resident who either pays more or decides not to travel, just as in this case it is the non-resident camper who may be excluded by quota or deterred by higher fees—or, depending on the magnitude of the tax, not have a Christian Science camp to attend.

And of course these non-profit organizations are in competition with other organizations providing the same service. To fulfill their mission, they must establish, maintain, and strengthen their organizations; and to do that they must attract both contributions and, if they are the

---

of the gross national product. Exempt organizations employ approximately eight million people." Frances R. Hill & Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* ¶ 1.01, at 1-1 (1994) (footnotes and citations omitted).

[54] *NLRB* v. *Yeshiva University*, 444 U.S. 672, 681 n.11 (1980) ("Congress appears to have agreed that nonprofit institutions 'affect commerce' under modern economic conditions.")

sort of service organizations involved here, patrons. It would blink reality to suggest that summer camps and nursing homes and boarding homes, profit or non-profit, are not in competition.[55]

But beyond the policy respecting free channels of commerce that is directly implicated by § 652(1)(A)(1), there is a broader, perhaps more fundamental, policy at stake. Indeed, the Law Court took note of it: "The exemption statute bears no resemblance to the types of economic regulation that 'excite those jealousies and retaliatory measures the Constitution was designed to prevent.' "[56] But having raised the right question, the court got the answer backwards. We submit that this statute is exactly the sort that is likely to incite resentment and retribution. Accordingly, it is well within the zone of concern marked by the dormant Commerce Clause, "a chief occupation of [which] . . . was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis,

---

[55] While the Law Court did not so suggest with respect to camps in general, it did say that "nothing in the record suggests that Camps *competes* with other summer camps" because "Camps is unique, serving a very limited segment of the population who choose to attend Camps because of the religious affiliation and the desirability of the location and services." Pet. 6a. We note that for petitioner to lose the tax exemption because of the court's view of the consequences of its religious affiliation would raise serious free exercise issues. But as to the point at issue, first, if interstate commerce is unduly burdened, competition is not necessary, as *Edwards* demonstrates; second, there is unquestionably competition among the affected organizations generally, and the challenge is to the statute both on its face and as applied (J.A. 14); and, finally, the court was wrong about petitioner, since competing camps are, of course, open to Christian Science families.

[56] Pet. 6a. (Citing *C & A Carbone, Inc.* v. *Town of Clarkstown*, 116 S. Ct. at 1682.)

History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259." *G.A.F. Seelig*, 294 U.S. at 522.

In *Edwards*, this Court recognized that "[t]he prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures . . . ." 314 U.S. at 176. Similarly, what Maine says to other states through this statute is not just that charity begins at home, but that it ends there too. In terms of impact, the message is quite different than that conveyed by direct assistance to state residents. "In the words of Justice Holmes, 'even a dog distinguishes between being stumbled over and being kicked.' "[57] Overtly targeting charities for serving non-residents is the very sort of "interfering and unneighborly regulation" that the Constitution was designed to end:

> "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have . . . given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, will be multiplied and extended . . . . [W]e may reasonably expect from the gradual conflicts of state regulation that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." Alexander Hamilton, *The Federalist No. 22* (1787).

Moreover, the potentially destructive impact of empowering states to exact discriminatory property taxes would, in our view, be augmented by their consequent power to restrict charitable state income tax deductions in the same way. We see no basis for distinguishing between the two. And if a state concluded that there was enough to gain to warrant taking the first step, it is hard

[57] O.W. Holmes, *The Common Law*, p. 3 (1881), quoted in Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1252 (1986).

to see why it would stop short of the other. But surely it is unlikely that a significant move by one state to advantage its own at the expense of its neighbors would be contained. If Virginia, say, were to disallow deductions for contributions to charities serving many District of Columbia or Maryland residents, one would not suppose those jurisdictions would long abide without responding in kind.[58]

We leave to *amici curiae*, who are much better informed than we, the quantification of the potential impact of such legislation upon the non-profit community. It would, of course, be enormous. The property of virtually every well-known, and many not so well-known, private colleges and universities in the country would be exposed.[59] And restrictions on tax deductions would put at risk the principal source of funding for countless other non-profit organizations, including, it may be presumed, every national charity.

What we wish to underscore is the legal significance of this potential disruption of the nation's network of non-profit organizations. We suggest that such a fracturing of support for charities along state boundaries would be foreign to this country's traditions. The pattern of ex-

[58] The respondent discounts this fear because the 1963 state court decision upholding this statute against attack on other grounds than presented here "did not lead to a stampede of states and municipalities enacting similar legislation." Br. Opp. 7. But of course the impact of a state court affirming an obscure statute of very limited applicability on non-Commerce Clause grounds is scarcely likely to match the reaction to this Court's affirmance of what has become a very well-known statute in litigation that is being watched carefully, as the *amici curiae* participation indicates. We add that, if this statute represented sound public policy, as respondent maintains, there would be no reason to be wary of its replication in all 50 states.

[59] Section 652(1)(A)(1) does not apply to educational institutions in Maine, which are covered by a different provision.

isting laws is evidence that it would. While we cannot pretend to have examined every state and local property tax, it is clear that the Maine statute is most unusual. We have found only one minor similar property tax provision and no limitations on state income tax deductions turning on residence of an organization's beneficiaries.[60]

The reasons may include a doubt about legality or a fear of retribution. This restraint may also, however, reflect a felt obligation to treat pervasive social needs as challenges to the national, as well as to the local, community. Such a sense of shared responsibility was noted in *Edwards* with respect to the pressing needs born of the Depression. In taking note of that spirit, the Court invoked Justice Cardozo's classic expression in *G.A.F. Seelig*, 294 U.S. at 523, of the fundamental values reflected in the dormant Commerce Clause. In rejecting the contention that the discriminatory legislation there involved should be sustained because designed to promote the welfare of the state's farmers, Justice Cardozo declared:

> "To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

That, at root, is the burden of our argument.

---

[60] See Mich. Stat. Ann. § 7.7(4n) ("Real estate not to exceed 400 acres of land in this state owned by a boy or girl scout or camp fire girls organization, a 4-H club or foundation, or a young men's Christian association or young women's Christian association is exempt from taxation under this act, if at least 50% of the membership of the association or organization are residents of this state," but residence requirement may be waived by county board of commissioners).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed. The case should be remanded to that court so that the state courts may award petitioner appropriate relief.

Respectfully submitted,

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Of Counsel

WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

May 10, 1996

* Counsel of Record